

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CEASAR R. BANKS,

Plaintiff,

ORDER

v.

09-cv-98-bbc

CAPTAIN KARTMAN,
LIEUTENANT R. SKIME,
K. SOLOMON,
CAPTAIN HESSELBERG and
JANE DOE,

Defendants.

On April 14, 2009, I entered an order granting plaintiff leave to proceed on his claims that defendants Kartman, Skime and Solomon violated his rights under the due process and equal protection clauses of the Fourteenth Amendment. In an order dated May 7, 2009, I allowed plaintiff to amend his complaint to add Captain Hesselberg and Jane Doe as defendants to this action. On May 19, 2009, the named defendants filed an answer to plaintiff's amended complaint, raising various affirmative defenses. Now plaintiff has filed a document titled "Plaintiff's Response in Opposition to Defendants Answer to the Plaintiff Amended Complaint," that I construe as a reply to the answer.

Fed. R. Civ. P. 12(b) permits a defendant to avoid litigation of a case if plaintiff's allegations of fact, even if accepted as true, would be insufficient to make out a legal claim against the defendant. Although defendants have raised certain affirmative defenses in their answer they have not filed a motion to dismiss. If such a motion were to be filed, plaintiff would be allowed to respond to it. Otherwise, it is not necessary for plaintiff to respond to defendants' answer. Indeed, Fed. R. Civ. P. 7(a) forbids a plaintiff to submit a reply to an answer unless the court directs a reply to be filed. No such order has been made in this case. Plaintiff should be aware, however, that he is not prejudiced by Rule 7(a). Fed. R. Civ. P. 8(b)(6) provides averments in pleadings to which a response is not allowed are assumed to be denied. Therefore, although plaintiff is not permitted to respond to defendant's answer, the court assumes that he has denied the factual statements and affirmative defenses raised in that answer.

Plaintiff has also filed a motion for entry of default and an affidavit in support of the motion. In his affidavit, plaintiff contends that defendants are in default because they did not file a timely response to plaintiff's complaint. Defendants filed their answer on May 19, well within the 40-day deadline established in the informal service agreement between the Attorney General and this court. Therefore, plaintiff's motion for entry of default will be denied.

ORDER

IT IS ORDERED that plaintiff's reply to defendants' answer, dkt. #67, will be placed in the court's file but will not be considered.

Further, IT IS ORDERED that plaintiff's motion for entry of default, dkt. #68, is DENIED.

Entered this 8th day of June, 2009.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge